Public Prosecutor v Basri bin Talib

HIGH COURT (MELAKA) — CRIMINAL APPEAL NO 41–16 OF 2003
ABU SAMAH NORDIN J
2 FEBRUARY 2006

Criminal Law — Child Act 2001 — s 31(1)(a) — Appropriate sentence — Whether objectives of Act to be considered in assessing sentence — Long custodial sentence, effects of upon family

Criminal Procedure — Sentence — Appeal against sentence — Whether manifestly excessive — Two years' imprisonment and three years' good behaviour bond for physically abusing child under Child Act 2001 — Abused child under care and custody of accused parent — Whether long custodial sentence warranted — Whether long custodial sentence imposed upon accused parent could adversely affect abused child — Whether long custodial sentence could destroy family — Whether shorter custodial sentence would enable accused parent to assume parental responsibility and save family

Criminal Procedure — Sentence — First offender — Factors to be considered when assessing sentence — Magistrate failing to consider that accused was unrepresented, a first offender, and had pleaded guilty — Whether appellate interference warranted

The appellant was charged in the magistrate's court under s 31(1)(a) of the Child Act 2001 for physically abusing his nine and a half year-old daughter ('the victim'). He was unrepresented. He pleaded guilty, was convicted and sentenced to two years' imprisonment. He was further ordered to execute a three year good behaviour bond. He appealed represented to the High Court against sentence, contending that it was excessive. Counsel urged the High Court to substitute the sentence of imprisonment with fine only as the appellant had pleaded guilty and was a first offender.

Held, reducing the sentence of imprisonment:

(1) The magistrate, in her judgment, failed to take into account that the appellant had pleaded guilty and was a first offender. Further, nothing was known about the appellant's background. Being a first offender, the court should have had regard, inter alia, to the appellant's character, antecedents, age, health and mental condition before passing sentence. Where the appellant is unrepresented, it is desirable for the court to enquire from the offender himself before passing sentence (see paras 15–16).

(2) In the instant case: (i) the victim's parents were divorced in 1995 when she was about one year old; (ii) the victim's natural mother had not seen the victim

since the divorce; (iii) the victim would not be able to recognise her natural mother; (iv) the appellant remarried in 1996; (iv) the appellant had two other children to support; (v) the victim remained under the appellant's care and custody; (vi) while on bail pending appeal, the appellant had not harmed the victim; and (vii) the appellant had regretted his action. Under these circumstances, a long custodial sentence, would deprive the victim of parental care, love and financial support. It could leave adverse effects on her — emotionally and psychologically. A long custodial sentence would also leave the (other) dependent children without parental care, love and financial support (see paras 17–18).

(3) Whereas the High Court viewed any offence of violence against children under the Child Act 2001 gravely and seriously, the Act was not solely meant to punish the offender. The Act was specially enacted to consolidate the laws relating to the care, protection and rehabilitation of children. The objectives of the Act had to be looked at as a whole. In the instant case, a long prison sentence could well destroy the family bond between the father (the appellant) and the daughter (the victim) and cause the family to disintegrate — an eventuality which the Act sought to prevent (see para 19).

(4) A shorter term of imprisonment together with the order that the appellant enter into a bond of good behaviour for a period of three years with one surety, would be appropriate. This would enable the appellant to assume his parental responsibility immediately upon his release and try to save his family from disintegration (see para 20).

[Bahasa Malaysia summary

Tertuduh dituduh di mahkamah majistret di bawah s 31(1)(a) Akta Kanak-Kanak 2001 kerana mendera secara fizikal anak perempuannya yang berumur sembilan setengah tahun ('si mangsa'). Beliau tidak diwakili peguam. Beliau mengaku bersalah dan disabit serta dihukum dua tahun penjara. Beliau kemudiannya diperintahkan memeterai satu bon perangai baik selama tiga tahun. Beliau merayu ke Mahkamah Tinggi terhadap hukuman tersebut atas alasan yang hukuman tersebut berlebihan. Peguam mendesak Mahkamah Tinggi menggantikan hukuman penjara tersebut kepada hukuman denda sahaja kerana perayu telah mengaku bersalah dan beliau adalah pesalah kali pertama.

Diputuskan, mengurangkan hukuman penjara:

(1) Majistret dalam penghakimannya gagal untuk mengambil kira yang perayu mengaku bersalah dan beliau merupakan pesalah kali pertama. Selanjutnya, tiada apa yang diketahui mengenai latar belakang perayu. Sebagai pesalah kali pertama, mahkamah wajar mengambil kira, antara lain watak peribadi perayu, perkara-perkara terdahulu, umur, kesihatan dan keadaan mental sebelum hukuman diberikan. Bilamana, perayu tidak diwakili, adalah wajar bagi mahkamah untuk membuat pertanyaan itu dari pesalah itu sendiri sebelum memberi hukuman (lihat perenggan 15–16).

(2) Dalam kes semasa: (i) ibu bapa si mangsa bercerai dalam tahun 1995 semasa beliau baru berumur satu tahun; (ii) ibu kandung si mangsa tidak pernah melawat si mangsa semenjak perceraian tersebut; (iii) si mangsa tidak mungkin dapat mengenali ibu kandungnya; (iv) perayu berkahwin semula dalam tahun 1996; (iv) perayu mempunyai dua orang anak untuk ditanggung; (v) si mangsa berada di bawah jagaan dan tanggungan perayu; (vi) semasa dalam ikat jamin sementara menunggu rayuan, perayu tidak mencederakan si mangsa; dan (vii) perayu telah menyesali perbuatan beliau. Di bawah keadaan-keadaan ini, satu hukuman penjara yang panjang, akan menyebabkan si mangsa kehilangan jagaan, kasih sayang dan sokongan kewangan seorang bapa. Ia mungkin akan memberikan kesan negatif terhadapnya — secara emosi dan psikologi. Suatu hukuman penjara yang panjang juga akan menyebabkan anak yang lain kehilangan jagaan, kasih sayang dan sokongan kewangan bapanya (lihat perenggan 17–18).

(3) Walaupun Mahkamah Tinggi memandang sebarang kesalahan keganasan terhadap kanak-kanak di bawah Akta Kanak-Kanak 2001 sangat serius, Akta tersebut bukan sahaja bertujuan untuk menghukum pesalah. Akta tersebut digubal khusus untuk menggabungkan undang-undang berhubung dengan jagaan, perlindungan dan pemulihan kanak-kanak. Objektif akta tersebut hendaklah dilihat secara keseluruhan. Di dalam kes semasa, satu hukuman penjara yang panjang boleh menjejaskan ikatan keluarga di antara si bapa (perayu) dan si anak (si mangsa) dan menyebabkan keluarga berpecah belah — sesuatu yang Akta tersebut ingin halangi (lihat perenggan 19).

(4) Suatu tempoh penjara yang lebih singkat bersama dengan perintah yang perayu hendaklah memeterai satu bon perangai baik selama tiga tahun dengan satu penjamin, adalah wajar. Ini akan membolehkan perayu mengambil semula tanggungjawab sebagai seorang bapa sebaik sahaja beliau dibebaskan dan cuba menyelamatkan keluarganya dari berpecah belah (lihat perenggan 20).]

Notes

For cases on appeal aginst sentence, see 5(1) *Mallal's Digest* (4th Ed, 2004 Reissue) paras 3102–3131.

Cases referred to

Leong Kok Huat v PP [1998] 6 MLJ 406 (refd)
Lim Guan Eng v PP [1998] 3 MLJ 14 (refd)
Mohamed bin Senik v PP [2005] 4 MLJ 164 (refd)
Mohamed Abdullah Ang Swee Kang v PP [1988] 1 MLJ 167 (refd)
Ng Tuck Shen v PP [1982] 1 MLJ 27 (refd)
PP v Loo Choon Fatt [1976] 2 MLJ 256 (refd)
PP v Mohamed Nor & Ors [1985] 2 MLJ 200 (refd)
PP v Ravindran & Ors [1993] 1 MLJ 45 (refd)
R v Costen (1980) 11 Cri App (S) CA 182 (refd)
Rex v Teo Cheng Lian [1969] MLK 170 (refd)
Sau Soo Kim v PP [1975] 2 MLJ 134 (refd)
Zaidon Shariff v PP [1996] 4 CLJ 441 (refd)

Legislation referred to
Child Act 2001 s 31(1)(a), (2)
Criminal Procedure Code s 294

Nor Hisham (Hisham Leong & Associates) for the appellant.
Faradziah bte Kasah (Deputy Public Prosecutor) for the respondent.

Abu Samah Nordin J:

[1] The appellant, aged 42 years, was charged in the Magistrate's Court Melaka under s 31(1)(a) of the Child Act 2001, for physically abusing his natural daughter who was then about nine and a half years old.

[2] He pleaded guilty and was sentenced to two years imprisonment and ordered to execute a bond with one surety to be of good behaviour for a period of three years immediately after serving his sentence of imprisonment. He was then unrepresented.

[3] He is now appealing against the sentence on the ground that it is excessive. The learned counsel for the appellant urged the court to substitute the sentence of imprisonment with fine only as he had pleaded guilty and was a first offender. The phrase 'shall be liable' in s 31(1) of the Act means that the sentence of imprisonment is only discretionary and not mandatory (see *Leong Kok Huat v Public Prosecutor* [1998] 6 MLJ 406). He had by pleading guilty saved the court's time and expense (see *Sau Soo Kim v Public Prosecutor* [1975] 2 MLJ 134).

[4] The victim was, since birth and still is, under the appellant's care and custody as her parents were divorced in 1995. The mother had remarried and had never visited her. The appellant remarried in 1996 and the victim had, since then been staying with the appellant and the stepmother. The appellant is also looking after two other children. The elder one, aged 19 years, is studying in Universiti Teknologi Mara and the younger brother, aged 17 years, is in Form Five. A custodial sentence wound deprive the victim and her brothers of their parent's love and financial support.

[5] The learned Deputy Public Prosecutor ('DPP') submitted that the appelllant had committed a very serious offence and the medical evidence and the photographs showed that the victim had suffered physical injuries all over her body. Old scars could be seen from the photographs. The appellant had inflicted those injuries both with his belt and bare hands. The appellate court ought not to disturb the sentence by the learned magistrate in exercise of her discretion unless she proceeded on wrong principles (see *Mohamed bin Senik v Public Prosecutor* [2005] 4 MLJ 164) or there was a failure to apply the right principles (see *Zaidon Shariff v Public Prosecutor* [1996] 4 CLJ 441.

[6] As the Child Act came into force only recently, namely on 1 August 2002, I enquired from the learned DPP whether there has been any reported case in respect of a smilar offence, to which learned DPP replied that, to the best of her knowledge, there was none. She could only rely on a number of English cases referred to by DA

Thomas on *Principles of Sentencing* (2nd Ed) at pp 109–110, namely *Doharty*, *Harris*, *Kindle* and *Bull*. In all those cases, the victims were between six months old and three years old. In *Doherty*, the appellate court reduced the sentence from four years to two years imprisonment, in *Bull* from three years to two years imprisonment. The appellate court upheld the sentence of three years imprisonment in *Hindle* and two years imprisonment in *Harris*. The learned author made the following observation at p 108:

> Speaking generally of cases of violence to children, the court observed that few cases presented greater difficulties in sentencing; 'at one extreme they reveal utter brutality which must be dealt with very severely at the other extreme one gets cases of undoubted maltreatment where the explanation is to be found in social inadequacy or momentary loss of temper'. In cases in the latter category an individualized measure may be approved, provided that the degree of violence used against the child is not grave and arrangements can be made for sufficient support and supervision to make recurrence of the offence unlikely.

[7] In short, the appropriate sentence depends on the facts of each case. The principles governing the court on appeal against sentence have been well established (see *Public Prosecutor v Loo Choon Fatt* [1976] 2 MLJ 256, *Ng Tuck Shen v Public Prosecutor* [1982] 1 MLJ 27, *Public Prosecutor v Mohamed Nor & Ors* [1985] 2 MLJ 200, *Lim Guan Eng v Public Prosecutor* [1998] 3 MLJ 14, *Mohamed bin Senik v Public Prosecutor* [2005] 4 MLJ 164, *Zaidon Shariff v PP* [1996] 4 CLJ 441.

[8] Gordon Smith J in *Rex v Teo Cheng Lian* [1969] MLK 170 at p171 said:

> There must be a manifest error either in law or in considering the facts and circumstances of the case or an omission to consider such facts and circumstances before the higher court interferes with the discretion undoubtedly vested in the lower court.

[9] In *Public Prosecutor v Loo Choon Fatt*, Hashim Yeop A. Sani J said (at p 257):

> The principles to be applied in imposing sentence however are the same in every case. The High Court sitting in exercise of its revisionary powers will not normally alter the sentence unless it is satisfied that the sentence of the lower court is either manifestly inadequate or grossly excessive or illegal or otherwise not a proper sentence having regard to all the facts disclosed on the record or to all the facts which the court ought to take judicial notice of, that is to say, that the lower court clearly has erred in applying the correct principles in the assessment of the sentence. It is a firmly established practice that the court will not alter a sentence merely because it might have passed a different sentence

[10] The Supreme Court in *Public Prosecutor v Mohamed Nor & Ors* echoed the same principles (at p 202):

> In this regard we would observe that it is the established principle that an appellate court should be slow to interfere or disturb with a sentence passed by the court below unless it is manifestly wrong in the sense of being illegal or of being unsuitable to the proved facts and circumstances. And the mere fact that another court might pass a different sentence provides no reason for the appellate court to interfere if the court below applies the correct principles in the assessment of the sentence.

[11] The relevant factors to be considered in assessing sentence had been restated in *Mohamed Abdullah Ang Swee Kang v Public Prosecutor* [1988] 1 MLJ 167 at p 170 as follows:

> In assessing the length of custodial sentence, the court must look at the overall picture in perspective by considering, firstly, the gravity of the type of offence committed; secondly, the facts in the commission of the offence; thirdly, the presence or absence of mitigating factors, and fourthly, the sentences that have been imposed in the past for similar offences to determine the trend of sentencing policy, if any.

Halsburys Laws of England Vol 9, para 365 sums up the relevant factors as follows:

> The court, in fixing the punishment for any particular crime, will take into consideration the nature of the offence, the circumstances in which it was committed, the provocation which he had received, if the crime is one of violence, the antecedents of the prisoner up to the time of the sentence, his age and character

[12] A plea of guilty is generally rewarded with a discount of between ¼ to of what otherwise would have been the sentence. The said discount is not based on the maximum sentence provided by law (see *Mohamed Abdullah Ang Swee Kang v Public Prosecutor* and *Public Prosecutor v Ravindran & Ors* [1993] 1 MLJ 45.

[13] The court nevertheless retains the discretion to impose a higher sentence without giving a discount in appropriate cases. See for example *R v Costen* (1980) 11 Cri App (S) CA 182 where the court said:

> But there are certain exceptions, likewise well authenticated in the authorities, to that general rule that discount will be allowed for a plea of guilty. The first and most important exception is the protection of the public. Where it is necessary that a long sentence, if necessary the maximum sentence should be passed in order to protect the public, in those circumstances a plea of guilty may not result in any discount

[14] The pertinent question in this appeal is whether the learned magistrate had considered the above factors in sentencing the appellant. The appellant was unrepresented when he pleaded guilty and sentenced. An obvious omission is that the learned magistrate did not in her judgment take into account that the appellant had pleaded guilty and was a first offender.

[15] Nothing is known about the appellant's background. Being a first offender, the court, shall have regard, among others, to his character, antecedents, age, health and mental condition before passing sentence: see s 294 of the Criminal Procedure Code. It is, in my view, desirable for the court to enquire from the offender himself where he is unrepresented before passing sentence.

[16] Before me, the appellant had, through his counsel, regretted his action and while on bail pending appeal, he had not done any harm to the daughter, who remained, and still is, under his care and custody. The victim's parents were divorced

in 1995 when she was about one year old. The appellant remarried in 1996. The victim's natural mother had not seen her since the divorce and it appeared to me, that she herself would not be able to know or recognise her own mother. This information was not before the court of first instance.

[17] A long custodial sentence under the circumstances, would in my view deprive her of parental care, love and financial support. It may have an adverse emotional and psychological effect on her. One wonders whether a non-working and dependent stepmother, would affectionately look after the child whilst her husband is serving a long custodial sentence. She may even decide to quit the matrimonial home. The appellant had two other children to support, namely a 19 years old son studying in UiTM and a 17 years old son in Form Five. The effect of a long custodial sentence, would leave the dependent children without parental care, love and financial support.

[18] Let me make it clear here in order to dispel any perception that the court is lenient on sentence. The court views any offence of violence against children under the Child Act as grave and serious. Any offender, if found guilty under the Act will be met with a stiff sentence where circumstances of the case warrant it. The Act, however is not solely meant to punish the offender. The Act is specially enacted to consolidate the laws relating to the 'care, protection and rehabilitation of children/ We have to look at the objectives of the Act as a whole. One of the ideals of Act as expressed in the preamble is to assist the family to 'assume their responsibilities as the source of care, support, rehabilitation and development of children in society.' A long prison sentence in this case may well destroy the family bond between the rather and the daughter. The family may eventually disintegrate, an eventuality which the Act seeks to prevent.

[19] For the above said reasons, I am of the considered view that a sentence of one year imprisonment would be adequate. The sentence of imprisonment is therefore reduced from two years to one year imprisonment. The order of the learned magistrate under s 31(2) of the Act is affirmed. A shorter term of imprisonment coupled with the order that the appellant entered into a bond of good behaviour for a period of three years with one surety would be more appropriate as this would enable him to assume his parental responsibility immediately upon his release and try to save the family from disintegration. If he does not repent and starts to abuse the child again after his release, he will be greeted with a longer term of imprisonment.

[20] I had observed that the daughter was seated between the appellant and her stepmother in the public gallery while the court was hearing other cases. I had enquired from the parties whether it would be advisable for the victim to leave the courtroom before pronouncing my decision. With agreement of the appellant's counsel, the daughter, accompanied by the stepmother, voluntarily left the courtroom before I announced my decision. It was also out of concern of her future and welfare, that I enquired from my interpreter what transpired after I stepped down

from the bench at the end of the appeal. I was told that the daughter embraced the father, kissed his hands and wept before he was taken away to custody.

Imprisonment sentence reduced.

Reported by John Paul Simon